TAXATION OF THINGS IN TRANSIT. III.[1]

OUR transit thus far has taken us to cases in which property temporarily present on tax day unsuccessfully relied on the commerce clause for exemption from taxation, when it appeared that the halt in the interstate travel was for some independent purpose.[2] It has taken us to at least one case in which the due-process and the commerce clauses together have restrained a State from assessing property flitting in and out during the year at a greater value than the fair average that may be deemed to be localized within the State.[3] In this case the complainant relied only on the Fourteenth Amendment. The court threw in the commerce clause gratuitously. It is, however, a fair inference from the opinion, as it is the only sound inference from the decision, that the due-process clause alone is enough to compel the State to stay its hand. It seems, then, that a succession of temporary presences on different days in the year cannot be added together and the total taken as the index of the property which has the *situs* for taxation required by the Fourteenth Amendment. Due process of law requires that this total in some way be divided in order to

[1] For preceding instalments of this discussion see 7 VA. LAW REV. 167-194 (December, 1920) and 7 VA. LAW REV. 245-279 (January, 1921).

[2] Bacon *v.* Illinois (1913) 227 U. S. 504, 33 Sup. Ct. 299, 7 VA. LAW REV. 180-182; American Steel & Wire Co. *v.* Speed (1904) 192 U. S. 500, 24 Sup. Ct. 365, 7 VA. LAW REV. 183-184; General Oil Co. *v.* Crain (1908) 209 U. S. 211, 28 Sup. Ct. 475, 7 VA. LAW REV. 185-186; Susquehanna Coal Co. *v.* South Amboy (1912) 228 U. S. 665, 33 Sup. Ct. 712, 7 VA. LAW REV. 186-187. In the foregoing cases the property was taxed while in a jurisdiction intermediate between its place of origin and its place of ultimate destination. For taxation by the jurisdiction of origin see Coe *v.* Errol (1886) 116 U. S. 517, 6 Sup. Ct. 189, 7 VA. LAW REV. 189-190, and Diamond Match Co. *v.* Ontonagon (1903) 188 U. S. 82, 23 Sup. Ct. 266, 7 VA. LAW REV. 190-191. For taxation by the jurisdiction held to be the terminus of the journey see Brown *v.* Houston (1885) 114 U. S. 622, 5 Sup. Ct. 1091, 7 VA. LAW REV. 187-189, and Pittsburg & Southern Coal Co. *v.* Bates (1895) 156 U. S. 577, 15 Sup. Ct. 415, 7 VA. LAW REV. 189.

[3] Union Tank Line Co. *v.* Wright (1919) 249 U. S. 275, 39 Sup. Ct. 276, 7 VA. LAW REV. 260-273.

get the fair amount of property that may be considered to be within the State *throughout* the year.

This makes it certain that temporary presence at other times than on tax day is not enough to give jurisdiction to tax for a year. It makes us wonder whether temporary presence on tax day should give jurisdiction to tax for a year. In either case a taxing State gets more than it deserves. There is, of course, an important difference of degree. Property caught only on tax day has all the rest of the year in which to visit the State without contributing to its support. If every visit were counted and each visit taken as equivalent to a year's stay, a single itinerant car or engine might pay in a single year three hundred and sixty-five times as much as a stationary chattel of equal value. If we turn from single chattels to an owner of many chattels, we perceive the same distinction. Most owners can much more readily endure an assessment on the particular chattels present on tax day than an assessment on all the chattels that have paid a visit at any time during the year. Yet some owners will undoubtedly have no free incursions of their property to compensate them for the year's tax paid on the visitor who stayed over tax day. There will be instances in which, from the standpoint of economics, there is as much of the vice of extraterritoriality in taxing property present only on tax day as in taxing whatever comes in at any time.

If the law wishes to do justice in each individual case, it should not allow a State to treat any temporary presence as equivalent to a year's stay. Yet, so far as the commerce clause is concerned, temporary presence on tax day is treated just like presence for a year, except when the presence is incidental or contributory to interstate commerce. What we wish to discover is whether what satisfies the commerce clause satisfies also the Fourteenth Amendment. Was the Supreme Court interpreting the commerce clause in the light of its conception of *situs,* or was it not thinking of *situs,* when it held that the commerce clause permits taxation of chattels temporarily present, so long as the presence is unrelated to any interstate-commerce object? It may help in finding an answer to look to cases where the taxpayer is domiciled in the taxing jurisdiction and

then to cases where due-process is the only possible ground of complaint against the taxation of property only temporarily present.

IV

While the Supreme Court seems to have been always of the opinion that chattels are taxable wherever they have a permanent location,[4] it took something of a struggle to convince it that taxability away from the domicil of the owner should occasion immunity from taxation at that domicil. The principle became firmly established in Union Refrigerator Transit Co. *v.* Kentucky,[5] but only over the dissent of Chief Justice Fuller and Mr. Justice Holmes. Here it was held that Kentucky could not tax a Kentucky corporation on rolling stock that never visited Kentucky. This was in 1905. In 1911 Kentucky was more fortunate. Southern Pacific Co. *v.* Kentucky[6] allowed the Commonwealth to tax the ships of a Kentucky corporation, though these ships never touched a Kentucky port. The reason for the difference was that the ships meandered over the seas so that they never got taxed anywhere else, while the refrigerator cars kept to tracks in other States and were there taxable under such devices as we have seen employed.[7] It did not appear in the Union Refrigerator Case that the cars were actually taxed in the jurisdictions through which they ran. It seemed to be

[4] See Mr. Justice Swayne in St. Louis *v.* Ferry Co. (1871) 11 Wall. 423, 430, citing for the general principle M'Culloch *v.* Maryland (1819) 4 Wheat. 428, and Providence Bank *v.* Billings (1830) 4 Pet. 563. See also Mr. Justice Gray in Pullman's Palace Car Co. *v.* Pennsylvania (1891) 141 U. S. 18, 22-23, 11 Sup. Ct. 876. The first square decision on the point applying distinctly to chattels seems to be Brown *v.* Houston, note 2, *supra*.

[5] (1905) 199 U. S. 194, 26 Sup. Ct. 36. This case is treated with adequate fullness, if not with full adequacy, in 20 COLUMBIA LAW REV. 282, 287-296.

[6] (1911) 222 U. S. 63, 32 Sup. Ct. 13, 20 COLUMBIA LAW REV. 297-302.

[7] Pullman's Palace Car Co. *v.* Pennsylvania (1891) 141 U. S. 18, 11 Sup. Ct. 876, 7 VA. LAW REV. 248-253; American Refrigerator Transit Co. *v.* Hall (1899) 174 U. S. 70, 19 Sup. Ct. 599, 7 VA. LAW REV. 253-254; Union Refrigerator Co. *v.* Lynch (1900) 177 U. S. 149, 20 Sup. Ct. 631, 7 VA. LAW REV. 254; Cudahy Packing Co. *v.* Minnesota (1918) 246 U. S. 450, 38 Sup. Ct. 376, 7 VA. LAW REV. 274-276.

thought sufficient that it was feasible to tax them there. The law as to ships is stated to be that they do not lose their legal *situs* at the domicil of their owner unless they acquire an actual *situs* elsewhere. The Union Refrigerator Case was later declared not to "deny to the State of the domicil of the owner power to tax tangibles which had not acquired an actual *situs* elsewhere." [8] Yet, clearly, permanent absence from the domicil of the owner plus taxability elsewhere is enough to prevent the applicability to chattels of the maxim *mobilia sequuntur personam.* This artificial legal *situs* at the owner's domicil is imposed on complete absentees only when no actual physical *situs* is acquired elsewhere. The considerations of policy which have contributed these deductions from the due-process clause of the Fourteenth Amendment are clearly the disrelish for bi-state double taxation on the one hand and for complete exemption from taxation on the other.

These considerations of policy would seem to require the immunity from taxation at the domicil of the owner of that proportion of his wandering chattels which under the doctrine of Pullman's Palace Car Co. *v.* Pennsylvania [9] might be taxed in the other States through which they ran. The issue appeared to be presented in New York *ex rel.* New York Central & H. R. R. Co. *v.* Miller,[10] decided six months after the Union Refrigerator Case. This involved a New York franchise tax on corporations. Under the statute, the assessment was to be computed on the basis of the amount of capital stock employed within the State. The Supreme Court recognized that "some considerable proportion of the relator's cars always is absent from the State" [11] and dealt with the case on this basis, although it pointed out that the company's proof failed to show "the average number or proportion of cars absent from the State" [12] and questioned therefore whether it was in a position to urge a constitutional claim to any deduction on account of these absences.

[8] Mr. Justice Lurton in Southern Pacific Co. *v.* Kentucky (1911) 222 U. S. 63, 74, 32 Sup. Ct. 13.

[9] Note 7, *supra.*

[10] (1906) 202 U. S. 584, 26 Sup. Ct. 714.

[11] *Ibid.*, 595. [12] *Ibid.*

The Union Refrigerator Case was distinguished on the ground that none of the cars there in question ever visited the domicil of their owner, while in the case at bar "no part of the corporate property in question was outside of the State during the whole tax year." [13] Mr. Justice Holmes recognizes the principle that "property, even of a domestic corporation, cannot be taxed if it is permanently outside of the State",[14] but limits it by saying:

> "But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent *situs* of the property, notwithstanding its occasional excursions to foreign parts." [15]

While there is reference to the State's "own corporations", and the tax in question was called a franchise tax, the Supreme Court chose to treat it as a tax on the property of the corporation, and the opinion indicates plainly enough that the same decision would have been reached had the owner been a domiciled individual.

Up to this point, the opinion did not really meet the principle of the Union Refrigerator Case that taxability elsewhere requires exemption at the domicil. Manifestly taxability elsewhere is not precluded by the fact that the cars have their headquarters at the domicil of their owner. In some way or other it seems necessary to get away from the Pullman Case and others which sanction methods of taxing cars on trips in the State and absent from their main headquarters.[16] In attempting to do this, Mr. Justice Holmes spins pretty fine. He quotes the finding of facts in the Pullman Case that the "cars used in this State have, during all the time for which the tax is charged, been running into, through, and out of the State," [17] which he then interprets as follows:

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[13] *Ibid.*

[14] *Ibid.*, 596-597.

[15] *Ibid.*, 597.

[16] Cases in note 6, *supra.*

[17] 202 U. S. 584, 597. Quoted from 141 U. S. 18, 20.

> "The same cars were continuously receiving the protection of the State, and, therefore, it was just that the State should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied, was not decided, and it is not necessary to decide it now." [18]

A reading of the majority opinion in the Pullman Case is convincing that the decision did not turn on any finding that identical cars made repeated visits, and is persuasive that no such specific finding was made.[19] Moreover, in American Refrigerator Transit Co. *v.* Hall,[20] Mr. Justice Shiras declared that a tax on an average may be imposed "in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business." [21] Thus, even if Mr. Justice Holmes is free from positive mistreatment of the Pullman Case, he is blind to the principle to be derived from that and the Hall Case taken together.

Another reason given why the cars of the New York Central would not be taxable away from home has more in its favor. As Mr. Justice Holmes puts it:

> "In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home." [22]

Certainly if there were no specific cars continuously in a State,

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[18] 202 U. S. 584, 597.

[19] The statement of facts quoted above does not say that "each car" used in Pennsylvania has been continuously running into, through and out of the State. In the opinion of the court, Mr. Justice Gray does not say that the company has at all times substantially the same cars within the State, but "substantially the same number of cars".

[20] Note 7, *supra*.

[21] 174 U. S. 70, 82, 7 VA. LAW REV. 254.

[22] 202 U. S. 584, 597-598.

and if in addition no regularity to the incursions of different cars and no definite routes over which occasional visitors traveled, it would not be fitting to apply the track mileage ratio which had been applied in the Pullman Case.[23] Yet even under such circumstances Minnesota ought to be allowed to apply its gross-receipts tax to such spasmodic business as might be done within its borders. It seems a fairly safe guess that the Supreme Court would not exempt such travel from the doctrine of Cudahy Packing Co. *v.* Minnesota.[24] This possibility, however, was plainly not in the court's mind in the Miller Case. We must take the decision on the assumption made by the court that the casual trips away from home did not make the absentees or their owners liable to taxation elsewhere. A case in which such liability appears is explicitly excluded from consideration. So the decision stands for no more than the principle that cars indulging in interstate transit do not lose their taxa-

[23] The proof offered by the New York Central included evidence of the car mileage outside and inside of the State as well as of the road mileage. Of this evidence, Mr. Justice Holmes said:

> "If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time." (202 U. S. 584, 585).

Car mileage would not show the average number of specific cars continuously absent from the State; but the amount of car property which on the average is absent from the State is the same, whether all of the extra-state mileage is made by ten cars or by fifty. If three hundred and sixty-five cars are each absent one day during the year, the yearly absence of car property is one car. The same is true if you double the number of cars and cut the extra-state trip of each in two, or if you have half that number of cars absent for two days each. Of course, car mileage is unreliable if there is diversity in the speed of the travel within the State and without. One hundred miles of travel outside of the State might mean an absence for a day or for a week. It would seem, however, that if there were enough cars involved, these variations would counterbalance each other. From the discussion in the majority opinion in Union Tank Line *v.* Wright, note 3, *supra*, it seems that the court thought that the evils of the track-mileage ratio would be absent from a car-mileage ratio.

[24] Note 7, *supra*.

bility at their headquarters at the domicil of their owner unless they acquire an actual *situs* elsewhere. Yet it must be doubtful whether the court would confer immunity at the home State even though a proportion of the property actually acquired taxability elsewhere. The opinion in the Miller Case clearly limits the Union Refrigerator Case to situations in which the property or a proportion of it not only acquires an actual *situs* away from the domicil of its owner but also is permanently absent from that domicil. The likelihood that the cars of the New York Central did acquire a taxable *situs* outside of New York is such that there is reason to suspect that the Supreme Court means to allow the State of domicil to tax all cars that have their headquarters there, and possibly also to tax all cars that visit the State during the year.[25]

Whatever the Miller Case may lead to, its significance for the problem before us is the same. It shows that the State of domicil and of headquarters of cars not permanently present is not held to the same restrictions that are imposed on sister States. Other States must confine their assessment to a fair average of the chattels actually within their borders throughout the year.[26] The State of domicil and of headquarters is not so limited, unless other circumstances appear than that of merely taxing more cars than can be regarded as permanently present throughout the year. A distinction is made between taxability or immunity in the State which is the domicil of the owner and the headquarters of the cars and taxability or immunity in a State which is neither of these. This distinction can hardly be based on the commerce clause. It must be based on a conception of *situs*.

[25] It is difficult to tell whether Mr. Justice Holmes places much reliance on the fact that all the cars in question had their headquarters in New York. He does not use that term, but he speaks of "random excursions" from the State, and of the cars being taken from the State and then brought back. Unless this "headquarters" point is important in the decision, it would seem that the court would have to allow Kentucky to tax all the cars of the Union Refrigerator Transit Company, if each of them visited the State one day during the year. The same "headquarters" point may possibly distinguish the Miller Case from the *dictum* in Bacon *v.* Illinois, considered *infra*, pp. 437-40.

[26] Union Tank Line Co. *v.* Wright, note 3, *supra*.

As we saw in the case of ships,[27] the maxim *mobilia sequuntur personam* still has some applicability to chattels. They escape from the clutches of the State of their owner only when they are in a position to be grasped by some other State. The question is whether "legal *situs*" has been lost by the acquisition of a different "actual *situs*". These are essentially questions of jurisdiction to tax and not of the regulation of interstate commerce. The Miller Case was fought under the Fourteenth Amendment as well as under the commerce clause. The opinion, however, did not consider the commerce question. It seemed to be assumed that, if the cars had not lost their New York *situs* by their extra-state trips, there was no possibility of the New York tax being held void as a regulation of interstate commerce. If, therefore, the Miller Case stood alone, we should have reason to be confident that the issue under the commerce clause and the issue of jurisdiction to tax under the Fourteenth Amendment are in substance one and the same, and that the Supreme Court has been interpreting the commerce clause in the light of its conception of *situs*.

Such confidence, however, is considerably shaken by a very explicit *dictum* in Bacon *v.* Illinois,[28] already considered in the first instalment of this discussion. This case held that Chicago might tax grain there on tax day, though concededly there only temporarily. The claimed protection under the commerce clause was denied on the ground that the interstate transit had been broken for the independent purpose of removing the grain to a warehouse to be inpsected, weighed, cleaned, graded and mixed. It chanced that in this case Chicago was the domicil of the owner of the grain and of the warehouse. It was contended by the State that "even if the property was in transit, and was the subject of interstate commerce, it was nevertheless liable to assessment, in common with the other personal property of the plaintiff in error, because he was a resident of the State, and the property was within the limits of the county where the assessment was made."[29] To this, Mr. Justice Hughes replied:

[27] Southern Pacific Co. *v.* Kentucky, note 6, *supra.*

[28] (1913) 227 U. S. 504, 33 Sup. Ct. 299, 7 VA. LAW REV. 180-182.

[29] *Ibid.*, 511.

"This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the States. That denial rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The fact that such a burden is sought to be imposed by the State of the domicil of the owner, upon property moving in interstate commerce, creates no exception. That State enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner, but by the nature and effect of the particular State action with respect to a subject which has come under the sway of a paramount authority." [30]

This was fortified by reference to the reasoning in Coe *v.* Errol [31] and in General Oil Co. *v.* Crain.[32] The former case was said to have been "put upon the same basis as though the timber had been owned by residents of New Hampshire".[33] In the latter case, the owner was in fact a domestic corporation. Of this case, Mr. Justice Hughes says:

"The court considered the question from the standpoint of the general power of the State to tax. The oil was held to be taxable, but not upon the ground that its owner was domiciled in Tennessee. It was recognized that if the oil were actually in transit, it would not be taxable. But it was found not to be in movement through the State; it had reached the destination of its first shipment and was held at Memphis for the business purposes and profits of the company." [34]

Here, then, is an indication that the protection of the commerce clause would not be restricted by the Supreme Court to its conception of *situs*. True, there is no explicit statement that Mr. Bacon would have no due-process complaint even though the grain were only temporarily at his domicil and were re-

[30] *Ibid.*, 511-512.
[31] Note 2, *supra.*
[32] *Ibid.*
[33] 227 U. S. 504, 512.
[34] *Ibid.*, 514.

garded as still in the course of interstate transit. As he did not adduce the Fourteenth Amendment, there was no occasion to decide whether that clause of the Constitution forbids or allows what he disrelished. Yet Mr. Justice Hughes pretty plainly implies that the taxation before him is not obnoxious to the Fourteenth Amendment. His discussion of Coe *v.* Errol [35] shows that logs which belonged to a New Hampshire owner and which, never having been out of New Hampshire, could not possibly have any other *situs,* would nevertheless not be taxable by New Hampshire if in actual course of interstate transit on the day of assessment. This makes it plain that the commerce clause may exempt chattels from taxation, although the Fourteenth Amendment does not. It shows, then, that the protection of the commerce clause is not in all respects coextensive with that of due process of law. The evidence of this in Bacon *v.* Illinois [36] is *obiter dictum,* but it is *dictum* that is thought by the court to be of enough importance to occupy half of the opinion and to be elaborated very explicitly before passing to the deciding point that the property in question is not in transit and so not within the protection of the commerce clause.

In this elaborate *dictum,* no reference is made to New York *ex rel.* New York Central & H. R. R. Co. *v.* Miller,[37] decided seven years earlier. This case, as we have just seen, seemed to assume that, if the intermittent absences of specific items of an aggregate of rolling stock did not make any portion of that aggregate lose its *situs* at the domicil of its owner, no part thereof could claim any exemption under the commerce clause. The case seemed to apply the commerce clause in the light of a conception of *situs.* It said, in effect, that if the property has a *situs* at the domicil of its owner, it is not protected from taxation by the commerce clause, even though it is indulging in interstate transit. Bacon *v.* Illinois,[38] on the other hand, leads us to think that, if the grain there in question had been in the course of interstate transit, the commerce clause would have rendered it immune from taxation, even though its presence on tax day at the domicil of its owner satisfied all the requisites of

[35] Note 2, *supra.*
[36] Note 28, *supra.*
[37] Note 10, *supra.*
[38] Note 28, *supra.*

situs imposed by the Fourteenth Amendment. How shall we explain the difference between the decision in the Miller case and the *dictum* in the Bacon Case? Shall we say that the silence of the former with respect to the commerce question was not because that question was thought to be controlled by the conception of *situs,* but was because for some other reason the taxing of things in transit and things not permanently present did not violate the commerce clause? Is there under the commerce clause some distinction between chattels passing through the jurisdiction in which their owner is domiciled and chattels having their headquarters in that jurisdiction and leaving it only to return again? Or is there perhaps a difference between the vehicles which engage in interstate transit and the articles which they bear in such transit? Would Kentucky, though allowed to tax the ships of a Kentucky corporation that wander over the high seas,[39] be forbidden to tax products carried in those same ships and owned by the carrier or by some other Kentucky corporation? Does interstate transit really have anything material to do with exemption from taxation, when cars in transit may be taxed either at the domicil of their owner [40] or elsewhere,[41] provided in the latter case the values assessed fairly represent those within the jurisdiction throughout the year?[42]

We may need light on these questions in order to be in a position to attempt to answer some of the other questions that have previously been raised. The relation between the conception of *situs* and the application of the commerce clause to the taxation of chattels at the domicil of their owner may have some bearing upon the relation between the Fourteenth Amendment and the application of the commerce clause to the taxation of chattels when no power exists over their owner. In the cases dealing with the taxation of coal [43] and logs [44] and hard-

[39] Southern Pacific Co. *v.* Kentucky, note 6, *supra.*

[40] New York *ex rel.* New York Central & H. R. R. Co. *v.* Miller, note 10, *supra.*

[41] Cases in note 7, *supra.*

[42] Union Tank Line Co. *v.* Wright, note 3, *supra.*

[43] Brown *v.* Houston, Pittsburg & Southern Coal Co. *v.* Bates, Susquehanna Coal Co. *v.* South Amboy, note 2, *supra.*

[44] Coe *v.* Errol, Diamond Match Co. *v.* Ontonagon, note 2, *supra.*

ware [45] by jurisdictions other than that of the domicil of their owner, we have seen that, so far as the commerce clause alone is concerned, the State may tax for a year what may be present only for a week, provided the halt is not in aid of interstate transit or not incidental thereto. Were these interpretations of the commerce clause reached under the guidance of some conception of *situs* or do they carry no implication of what the Supreme Court thinks about *situs* and the general problem of assessing extraterritorial values? In such decisions, in which the commerce clause alone was adduced and was held not to exempt from taxation,[46] would an objection under the due-process clause be equally unavailing or would it raise a different issue on which for some strange reason the Supreme Court has not yet directly passed? Has the Supreme Court been making only interstate-commerce law or has it been making conflict-of-laws law as well? These questions are reserved for later discussion, if not for later answer. There is, of course, always the possibility that the Supreme Court has carelessly been making tracks in opposite directions. We may have to content ourselves with finding practical explanations for each of the various groups of decisions, without being able to integrate them into a symmetrical logical schematism. It may be fitting to confess that at this stage of my transit I have no idea of the place at which I shall finally arrive. Before attempting to emerge from the confusion which I have either discovered or created, we may as well look for further light or darkness from the Supreme Court opinions that have considered whether temporary presence is enough to give jurisdiction to tax chattels which concededly have no other claim to exemption than that which they may urge under the guarantee of due process of law.

V

Strange as it may seem, there are no decisions in which the Supreme Court has squarely held that the Fourteenth Amendment alone forbids taxing for a year what is present only tem-

[45] American Steel & Wire Co. *v.* Speed, note 2, *supra.*

[46] Cases in note 2, *supra.*

porarily. Neither are there Supreme Court decisions which squarely hold that temporary presence is enough to give jurisdiction to tax. The cases sustaining taxes at the domicil of the owner are not based on the actual presence of the property, as is evident from the decision allowing the taxation of ships that never visit the domicil of their owner.[47] The question here is whether the situation of the property is such that the conceptions of fairness which the judges induce into or deduce from the Fourteenth Amendment require the partial or total abdication of the maxim *mobilia sequuntur personam.* The situation and habits of the property are not the basis for allowing its taxation at the domicil of its owner, but are only possible circumstances which may require a refusal to recognize the traditional doctrine that chattels as well as intangibles have their *situs* for taxation at the domicil of their owner. The negative side of this traditional doctrine has long since been a dead letter. Chattels are taxable where they are permanently located, no matter where their owner has his domicil.[48] The question which has to be answered is whether permanent location will be assumed from presence on tax day or whether further proof is needed. Or, to approach the same question from another angle, what is needed to rebut the inference normally to be drawn from presence on tax day? Obviously the fact that the property is in actual motion to a point outside the taxing jurisdiction has an important bearing on the inference that might otherwise be drawn from its presence in that jurisdiction on tax day. Equally pertinent is the fact that the only break in such actual motion is wholly incidental to the motion. Such facts, as we have seen, make for exemption from taxation under the dictates of the commerce clause. What we wish to know is whether they also make for exemption under the Fourteenth Amendment, and, if so, whether they are the only facts which have this influence or whether they are part of a larger class.

The nearest that the Supreme Court has come to an adjudication of this issue is in Gromer *v.* Standard Dredging Com-

[47] Southern Pacific Co. *v.* Kentucky, note 6, *supra.*
[48] Note 4, *supra.*

pany.[49] Some scows owned by a Delaware corporation were sent to Porto Rico to do some dredging for the United States government. All the court agreed that the Porto Rican government had jurisdiction over the waters where the scows worked and that the contract with the United States conferred no immunity from local taxation. The majority insisted that the court did not have before it sufficient data to enable it to pass on the contention that the property had not acquired a *situs* in Porto Rico and declared furthermore that this contention was not properly raised and passed upon by the court below. The minority, consisting of Justices Day, Hughes and Lamar, insisted contrariwise, and were of opinion that on the facts before them the company was justified in its contention that the property had no *situs* in Porto Rico. The attitude taken by the majority makes it uncertain how much they would have differed from the minority had they thought the issue properly raised and sufficient facts before the court. They certainly did not close the door to a contention that temporary presence is not in and of itself enough to satisfy the requirement of *situs*, even when there is no contention that the property is actually or substantially in the course of interstate transit. It may help us to speculate as to the mental attitude of the majority if we have before us the pertinent discussion in the opinion of the court below.

The case arose in the United States District Court for the District of Porto Rico, where it is entitled Standard Dredging Company *v.* Gromer.[50] Judge Rodey's opinion emulates the shot-gun rather than the rifle, and so he scores several hits instead of only one. He based his jurisdiction on the ground of diversity of citizenship and made no reference to any possible additional ground that the controversy raised an issue under the Constitution or laws of the United States. He held that the property was not within the jurisdiction of Porto Rico and that the tax was therefore invalid. One of the grounds of this decision—doubtless the major ground—is that the scows stayed

[49] (1912) 224 U. S. 362, 32 Sup. Ct. 499.
[50] (1909) 5 Porto Rico Fed. Rep. 142.

in the harbor on waters over which Porto Rico had no jurisdiction to exercise the taxing power, whatever might be its jurisdiction to enforce police measures. To this is added the fact that the scows were used exclusively in and about the execution of a contract with the United States. As Judge Rodey puts it, "the local government has no jurisdiction over such waters in the sense of a power to tax property belonging to a citizen of a State of the Union, when such property has never been landed on the actual shores of the island, and is used exclusively in and about the execution of a contract with the national government, and there is no fact or circumstance connected with the property to fix its *situs* in Porto Rico in the taxing sense." [51] The opinion refers also to several unnamed cases in which local territorial governments were allowed to tax cattle on Indian reservations, but these were said to turn wholly on the question whether such reservations were within or without the boundaries of the particular territory. "We cannot find", continues Judge Rodey, "that any of them are in point as authority under circumstances such as surround the case at bar, where the waters and the lands under the same are national property, and the work being done is for the national government itself." [52] So also two cases in State courts [53] are distinguished for the reason that, "in each of them, the land underlying the navigable waters in the bay was property of the State itself; while in the case at bar, as stated, the title to such land still remains in the national government." [54]

Thus far, certainly, the opinion of the District Court involves no ruling on the question whether temporary presence confers jurisdiction to tax. Yet already Judge Rodey has declared:

> "It has, we think, been settled by numerous recent decisions of the Supreme Court of the United States, that the old rule of personal property following the domicil of the

[51] *Ibid.*, 148.

[52] *Ibid.*, 150.

[53] National Dredging Co. *v.* State (1893) 99 Ala. 462, 12 So. 720; Northwestern Lumber Co. *v.* Chehalis County (1901) 25 Wash. 95, 64 Pac. 909.

[54] 5 Porto Rico Fed. Rep. 142, 151-152.

owner has been so varied and departed from as that it does not mean very much at the present time; the real question to be decided in every such case being whether the personal property,—be the same rolling stock, machinery, merchandise, or even floating property, such as steamships, boats, or dredges,—has been brought within the taxing jurisdiction of the government attempting to levy the tax. In other words, it must always be determined that the *situs* of the property is within the taxing jurisdiction." [55]

For this are cited cases which went upon the issue of due process of law under the Fourteenth Amendment.[56] In distinguishing the State cases already referred to, the further point is made that they involved property in the jurisdiction for several years. Thus Judge Rodey says:

"It will also be noticed when examining the National Dredging Co. Case, from the State of Alabama, *supra,* that at least one of the scows, and perhaps other property, used in the dredging for the national government in Mobile bay, were made right there in the State of Alabama, and that all of the property involved in that suit had remained there for four or five years, and that, under the circumstances (the appropriations being made by Congress were apparently annual ones), it was natural to presume that the property would be kept there for several years more and its owners would become bidders upon future contracts for additional dredging work there, and keep the property indefinitely in the State; so that, in that case, there was no difficulty in fixing the *situs* of the property, because the property was clearly within the jurisdiction of the State of Alabama and the taxing power thereof. The court found that the property was not in that State temporarily, but indefinitely." [57]

So, in discussing Northwestern Lumber Co. *v.* Chehalis County,[58] Judge Rodey quoted the Washington court as saying: "Sound reasons exist for the right of the State to tax these ves-

[55] *Ibid.*, 146.

[56] Old Dominion Steamship Co. *v.* Virginia (1905) 198 U. S. 299, 25 Sup. Ct. 686; Ayer & Lord Tie Co. *v.* Kentucky (1906) 202 U. S. 409, 26 Sup. Ct. 697; Metropolitan Life Insurance Co. *v.* New Orleans (1907) 205 U. S. 395, 27 Sup. Ct. 499.

[57] 5 Porto Rico Fed. Rep. 142, 152-153.

[58] Note 53, *supra.*

sels that are permanently here, transacting local business." [59] He points out that "the tugs involved in that case had been in that State from four to seven years, engaged in private business; not, as here, working under the contract for the national government." [60] They were, he adds, "to all intents and purposes, property with its permanent *situs* in the State of Washington." [61] Pointing the contrast between these cases and the one before him, he concludes:

> "We do not think either of these cases, strong as they are, can be said to be parallel with conditions in the case at bar. We understand that the work in question is now practically completed, and that complainant is about to remove the property from Porto Rico." [62]

Thus plainly one of the missiles fired from Judge Rodey's shotgun was composed of the idea that these tugs were immune from taxation in Porto Rico because they were there only temporarily. He appears to approve of the State cases taxing tugs indefinitely in the jurisdiction, even though engaged on work for the national government. Indirect as is Judge Rodey's mode of treating the several issues on which he comments, he seems to have said enough about temporary presence to require an appellate court to pass on the point thus raised, in case it should reverse him on the other grounds of his decision.

This was the position taken by a minority of the Supreme Court in Gromer *v.* Standard Dredging Company.[63] Mr. Justice Day says that the opinion of the court below rightly treats the allegations of the bill "as raising the question of taxable *situs* of this property" [64] and that "after consideration of the subject the court reached the conclusion, not only that the local government of Porto Rico had no jurisdiction over the harbor and waters where this work was done, but that the property had no taxable *situs* in Porto Rico." [65] The majority, however, declare that

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[59] 5 Porto Rico Fed. Rep. 142, 153.

[60] *Ibid.* [61] *Ibid.*

[62] *Ibid.*, 154. Judge Rodey concludes by saying that the "property for the reasons stated, has no *situs* within the taxing jurisdiction of the government of Porto Rico."

[63] Note 49, *supra.* [64] 224 U. S. 362, 375.

[65] *Ibid.*, 375-376.

the bill of complainant did not raise the issue of *situs*, and that the grounds of the decision below did not include this issue. Mr. Justice McKenna remarks that counsel " 'invite the attention of the court' to 'certain other considerations' expressed in the opinion of the court below",[66] but he declines to analyze that opinion beyond saying that "elements that are really independent are mingled somewhat, making it difficult to assign the exact strength given to them respectively." [67] Thus the neglect of counsel and the confusion of the opinion below deprive us of an adjudication which we very much need. Yet enough is said by the majority to make it evident that on the facts before them they would have decided against the complainant. To quote Mr. Justice McKenna:

> "It, however, may be said that the property was only temporarily in the waters of Porto Rico, and that its *situs* was at the domicil of the dredging company.
>
> "The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the State in which it is, no matter where the domicil of the owner may be. Old Dominion S. S. Co. *v.* Virginia, 198 U. S. 299, 305.
>
> "The allegation is that prior to the 1st of April, 1908, the property was brought to and within the harbor of San Juan. The date is that of the assessment and levy of the tax, but whence the property had been brought, or how long it had been in the harbor before the levy of the tax is not averred, nor was it necessary for the cause of action alleged. There is not an intimation that the property had its *situs* for taxation elsewhere." [68]

This certainly is far from saying that the property would not be exempt if it were proven that its visit was ephemeral. There is an inference that if it were established that the scows were taxable at the domicil of their owner they would be exempt in Porto Rico. The difference between the majority and the minority seems to boil down to a disagreement as to the burden of proof. The majority want to know where the property came from and how long it has been in its present location be-

[66] *Ibid.*, 372-373.
[67] *Ibid.*, 373.
[68] *Ibid.*, 372.

fore they will go behind the fact that it is present on tax day. The minority seem to think that the State must establish that the property has lost its taxability at the domicil of its owner. As Mr. Justice Day puts it:

> "It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicil of the owner." [69]

For this he cites a Pennsylvania decision [70] which refused to exempt scows from taxation at the domicil of their owner, even though they had not been within the State during the year. The reason was that they shifted about between other States with sufficient frequency to escape acquiring a *situs* in any one of them. Of the property involved in that case, the Supreme Court had previously said that it "consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual *situs* beyond the jurisdiction of the State itself." [71] This approval of the Pennsylvania decision, insists Mr. Justice Day, warrants the Supreme Court in holding in this case that the dredges at work in Porto Rico still had their *situs* at the domicil of the company in Delaware and therefore had acquired no other *situs* elsewhere. His test is whether enough has appeared to deprive the property of its *situs* at the owner's domicil. The majority test is whether enough has appeared to show that the property is on a brief visit where it is caught on tax day. They seem less afraid of double taxation than of complete escape from taxation. They think that the complainant ought to assert and prove that he is taxable elsewhere, if he wishes to escape from taxation at the place where his property is discovered.

It is important to note, however, that nowhere does the ma-

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[69] *Ibid.*, 376.

[70] Commonwealth *v.* American Dredging Co. (1888) 122 Pa. St. 386, 15 Atl. 443.

[71] 224 U. S. 362, 383. Quoted from Mr. Justice Peckham in Delaware, L. & W. R. Co. *v.* Pennsylvania (1905) 198 U. S. 341, 356, 25 Sup. Ct. 669.

jority opinion controvert the general principles announced by Mr. Justice Day for the minority. Obviously these dredges were not in transit, so that any recognition that under the requisite circumstances they would not be taxable where found on tax day must be due to the conception of *situs* required by due process of law. The general principle is put by Mr. Justice Day as follows:

> "The decisions of this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly it does include the idea of location which is not of a temporary or fleeting character." [72]

The decisions then reviewed include those arising under the due-process clause alone, those arising under the commerce clause alone, and those arising under the due-process and the commerce clauses together. None of them is a square decision that due-process alone forbids the acquisition of *situs* based only on temporary presence, but the opinions in all of them indicate that this has all along been the assumption entertained by the Supreme Court. To quote from Mr. Justice Day:

> "In all the cases to which our attention has been called, decided in this court, the idea of permanency in the abiding place is emphasized as essential to taxable *situs*,—that is, the property sought to be taxed must become 'commingled' with the property of the State (Old Dominion S. S. Co. *v.* Virginia, *supra*), or 'intermingled' with the general property of the State (Delaware, L. & W. R. Co. *v.* Pennsylvania, *supra*), or 'permanently located' there (Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194), or 'incorporated in' the local property (Southern P. Co. *v.* Kentucky, *supra*). All these expressions indicate the idea of a permanent *situs* of the property." [73]

There is every reason to assume that the majority differ from the minority, not on this principle, but only on its application to

[72] 224 U. S. 362, 377.

[73] *Ibid.*, 378-379.

the case at bar. While they may be taken to agree that "actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction",[74] they do not agree with Mr. Justice Day when he adds:

> "Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of a location in Porto Rico sufficient to subject it to the taxing power of that territory." [75]

To the minority's declaration that "there is no showing that the property was permanently located in San Juan harbor", [76] the majority counter by asserting that there is no showing whence the property came, how long it had been there, or when or whither it was going. If the tax were to be regarded as levied for the year prior to the day of assessment, the company could hardly expect to escape without showing how close to tax day the property had arrived. If the tax is for the year subsequent to the day of assessment, the decision must depend upon a knowledge of the future. The company's attorneys did not act as seers for the court. Certainly the company was free to leave its dredges in Porto Rico as long as it liked. There was on tax day no certainty that they would ever leave. We are not told how extensive was the work undertaken in the harbor—whether it would be apt to take a month or five years to complete. Evidence on this point might be enough to show taxability, but it could hardly establish that the property would surely be taken away when the particular job was finished. The claim to immunity must therefore be based upon uncertain speculation as to the future or must rest upon the proposition that property brought in to perform a contract must be spared from taxation until further evidence as to its stay is forthcoming.

The latter position is rejected by the majority. Consciously or unconsciously it is accepted by the minority. But they recognize that evidence may later appear to end the immunity. In distinguishing the cases relied on by Porto Rico, they point out

[74] *Ibid.*, 379.
[75] *Ibid.*
[76] *Ibid.*

that one [77] had to do with dredges in the State to perform a series of contracts for work of a continuing character and that the other [78] involved tugs which had been in the State from four to seven years and which "were used for all those years appurtenant to and as a part of the lumber plant and business of the company in the county and State where taxed." [79] Mr. Justice Day evidently concedes that such property was rightly held taxable where used, for he calls the cases "entirely different in their facts" from the case at bar. In the case at bar the minority were willing to presume that the property was likely soon to move on, while the majority were not. But the majority give no indication that they disagree with the proposition that temporary presence is not enough to confer *situs* and that without *situs* a tax is not consistent with the requirements of due process of law.

Other evidence of the Supreme Court's recognition of this principle appears in two comments that have been made on the case of Buck *v.* Beach.[80] The facts in this case were that a New York citizen owning notes secured by mortgage on Ohio land committed the possession of the notes to an Indiana agent who parted with that possession only when he sent them to an Ohio agent for a few days around Indiana tax day and at other times for indorsement of payments on interest or principal. The majority held that the mere presence of the notes in Indiana did not make Indiana the *situs* of the debts which the notes represented. There was no hint in Mr. Justice Peckham's opinion that the notes were regarded as only temporarily in Indiana. Mr. Justice Day dissented, thinking that the presence of the notes in Indiana gave jurisdiction to tax and that in addition the situation was that the owner was running a loaning business in Indiana so that the credits were taxable under the theory of business *situs*. In the course of his dissenting opinion, he remarked:

"These notes were sent beyond the borders of the State of

[77] National Dredging Co. *v.* Alabama, note 53, *supra.*
[78] Northwestern Lumber Co. *v.* Chehalis County, note 53, *supra.*
[79] 224 U. S. 362, 381.
[80] (1907) 206 U. S. 392, 27 Sup. Ct. 712.

> Indiana only for collection, or for the few days when they were supposed to be liable for taxation, and, when such danger was thought to be passed, returned to the agent in Indiana." [81]

Notwithstanding this, Mr. Justice Day, in his dissenting opinion in Gromer *v.* Standard Dredging Co.,[82] says that in Buck *v.* Beach,[83] "this court, while recognizing the rule of taxable *situs* of personal property as distinguished from the domicil of the owner, held that *notes temporarily within a State,* although in the possession of an agent of the owner, and there held for collection, were not within the taxing power, where the owner lived elsewhere," [84] thus most unwarrantably endeavoring to make Buck *v.* Beach [85] stand for the doctrine that temporary presence does not confer *situs.*

The same idea was taken up two years later by Mr. Justice Holmes in Wheeler v. Sohmer,[86] which allowed an inheritance tax to be imposed on the transfer of notes in a safe-deposit box, though debtor and creditor were both domiciled in other jurisdictions. Of Buck *v.* Beach [87] he says:

> "The Ohio notes in Buck's hands that were held not to be taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either State. 206 U. S. 402. They really were in Ohio hands for business purposes, *ibid.,* 395, and sending them to Indiana was spoken of by Mr. Justice Peckham as improper and unjustifiable. *Ibid.* 402. Their absence from Ohio evidently was regarded as a temporary absence from home. *Ibid.* 404. And the conclusion is carefully limited to a refusal to hold the presence of the notes 'under the circumstances already stated' to amount to the presence of property within the State. A distinction was taken between the presence sufficient for a succession tax like that in this case, and that required for a property tax such as then was before the court, and the only point decided was that the notes had no such presence in Indiana as to war-

[81] *Ibid.,* 410.
[82] Note 49, *supra.*
[83] Note 80, *supra.*
[84] 224 U. S. 362, 376. Italics are author's.
[85] Note 80, *supra.*
[86] (1914) 233 U. S. 434, 34 Sup. Ct. 607.
[87] Note 80, *supra.*

rant a property tax. See New York *ex rel.* New York C. & H. R. R. Co. *v.* Miller, 202 U. S. 584, 597." [88]

This analysis is quoted, not as an object to be admired, but at an indication that the Supreme Court assumes that temporary location is not enough to confer *situs*, even where no commerce question is involved. Mr. Justice Holmes was evidently not unaware of the flaws in his reinterpretation of the earlier decision, for he adds that "if Buck *v.* Beach is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred." [89] Justices Day, Lurton and Hughes concurred in this opinion, but Justices McKenna and Pitney preferred to leave Buck *v.* Beach [90] where it originally stood, and to rest their concurrence on a distinction between property taxation and inheritance taxation. But neither they nor the three justices who dissented indicated any doubt that temporary presence of the notes would not be enough to justify a property tax. In sustaining the inheritance before the court, Mr. Justice Holmes was careful to say that "it must be taken that the safe-deposit box in which the notes were found was their permanent resting place." [91]

Four years before this the Supreme Court had before it in Board of Assessors *v.* New York Life Insurance Co.[92] the question whether certain items were taxable in Louisiana under the theory of business *situs*. A certain bank deposit was conceded to be taxable on this theory. But of another deposit, Mr. Justice Holmes observed:

"The account in question consists of deposits made solely for transmission to New York, and not used or drawn against by any one in Louisiana. We shall not inquire whether it would or would not be within the constitutional possibilities for a State to tax a person outside its jurisdiction for a bank deposit that only became his or came into existence as property at the moment of beginning a transit to him, and that thereafter left the State forthwith. It is enough to say that we should not readily believe that the supreme

[88] 233 U. S. 434, 440.
[89] *Ibid.*
[90] Note 80, *supra.*
[91] 233 U. S. 434, 440.
[92] (1910) 216 U. S. 517, 30 Sup. Ct. 385.

> court of the State would interpret the statutes of Louisiana as having that intent." [93]

This, of course, establishes no constitutional principle. Taken by itself, it can mean no more than an interpretation of a statute so as to avoid raising a constitutional issue. This avoidance carries no hint that the court doubted whether the same result could be based squarely on the Fourteenth Amendment, since it is a canon of constitutional interpretation that a court will avoid passing on a constitutional question whenever it can determine the rights of the parties without doing so. Had the Supreme Court really thought that this temporary bank deposit was property with a *situs* in Louisiana, it was hardly justified in excluding it from the intent of the statute. The case, therefore, is something of a make-weight in support of our conclusion that the Supreme Court recognizes an established principle that property cannot acquire a *situs* by entering for a brief stay. Certainty on this point, however, still leaves questions enough as to the application of the principle to concrete situations. We have still to speculate whether the articles that have failed to secure exemption by appeal to the commerce clause would have fared better had they adduced the Fourteenth Amendment or whether the Supreme Court's applications of the commerce clause reflect its conceptions of the requirements of due process of law.

[*To be concluded.*]

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[93] *Ibid.*, 523.